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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Colusa)

THE PEOPLE,

Plaintiff and Respondent,

v.

LUIS MANUEL PEREZ,

Defendant and Appellant.

C081047

(Super. Ct. Nos. CR533383,
CR53495)

OPINION ON TRANSFER

In March 2012, defendant Luis Manuel Perez entered a guilty plea to possession of a controlled substance (Health & Saf. Code, § 11377, subd. (a); unless otherwise set forth, statutory section references that follow are to the Health and Safety Code) (case No. CR533383), and sale or transportation of a controlled substance (§ 11379, subd. (a)). He also admitted an on-bail enhancement (Pen. Code, § 12022.1) (case No. CR53495) all in exchange for dismissal of the remaining counts in both cases.

In August 2012, the court denied probation and sentenced defendant to the midterm of three years for sale or transportation, two years for the on-bail enhancement, and a consecutive one-third the midterm or eight months for possession. The court ordered defendant to serve his sentence in county jail and suspended 1,337 days during which defendant would be on mandatory supervision. (Pen. Code, § 1170, subd. (h)(5)(B).) The court awarded presentence custody credits and imposed various fees and fines. Defendant did not appeal from the judgment.

Defendant violated mandatory supervision in 2013. Mandatory supervision was suspended while defendant entered rehabilitation and was reinstated after he completed rehabilitation.

In 2014, defendant again violated mandatory supervision. Mandatory supervision was reinstated.

In 2015, defendant admitted violating mandatory supervision for the third time. The court revoked and terminated mandatory supervision and denied probation. The trial court reduced defendant's felony possession conviction to a misdemeanor conviction pursuant to Penal Code section 1170.18 in case No. CR533383. The court lifted the stay and ordered defendant to serve the balance of the time imposed on the felony sentence previously imposed for transportation and the on-bail enhancement in case No. CR53495. The court resentenced defendant on misdemeanor possession to an eight-month term to be served consecutive to the felony sentence.

Defendant filed a notice of appeal in case No. CR533383 only. He did not seek a certificate of probable cause. (Pen. Code, § 1237.5.) Defendant did not file a notice of appeal in case No. CR53495. Pursuant to the rule of liberally construing a notice of appeal in favor of its sufficiency (Cal. Rules of Court, rule 8.304(a)(4)), we construe defendant's notice of appeal as including case No. CR53495. The People do not challenge the lack of a notice of appeal in case No. CR53495 and have responded to defendant's contentions on appeal.

Defendant contends (1) his transportation conviction should be reversed because there was no evidence that he transported for sale, (2) his on-bail enhancement must be reversed because his felony possession conviction was reduced to a misdemeanor, and (3) the trial court imposed the same sentence on the misdemeanor possession as it had imposed when the offense was a felony. In our original opinion, we rejected defendant's contentions. Thereafter, the Supreme Court granted defendant's petition for review and ultimately transferred the case with directions for this court to vacate our prior decision and to reconsider the cause in light of the recently decided *People v. Buycks* (2018) 5 Cal.5th 857 (*Buycks*). Finding the on-bail enhancement is no longer valid, we shall strike the enhancement and affirm the judgment as modified.

DISCUSSION

I

The On-Bail Enhancement

Defendant challenges the on-bail enhancement as no longer applicable because his felony possession conviction was reduced to a misdemeanor pursuant to Proposition 47 "for all purposes."

Proposition 47, the Safe Neighborhoods and Schools Act (Act) requires "misdemeanors instead of felonies for nonserious, nonviolent crimes . . . unless the defendant has prior convictions for specified violent or serious crimes." (Voter Information Guide, Gen. Elec. (Nov. 4, 2014) text of Prop. 47, § 3, p. 70.) Among the affected crimes is possession of a controlled substance, which is now a misdemeanor barring certain exceptions not relevant here. (See § 11377.)

In *Buycks*, the Supreme Court analyzed the meaning of the phrase "Misdemeanor for All Purposes" as used in the Act and concluded that, "in the absence of any express declaration of retroactive application, the default presumption applies to subdivision (k) so that its effect operates only prospectively." (*Buycks, supra*, 5 Cal.5th at p. 881.)

Applying the rule of *In re Estrada* (1965) 63 Cal.2d 740, the Supreme Court concluded that subdivision (k) applied retroactively to nonfinal judgments. (*Buycks*, at pp. 881-882.) “As a result, the reduction of a felony conviction to a misdemeanor conviction under Proposition 47 exists as ‘a misdemeanor for all purposes’ prospectively, but, under the *Estrada* rule, it can have retroactive collateral effect on judgments that were not final when the initiative took effect on November 5, 2014. [Citation.]” (*Id.* at p. 883.)

Subdivision (k) could apply retroactively to final judgments under the aegis of Penal Code section 1170.18. *Buycks* analogized resentencing pursuant to a Penal Code section 1170.18 petition to resentencing by the trial court when part of a sentence is stricken on appeal and the case remanded for resentencing. In both instances, the trial court can modify every aspect of resentencing, not just the part of the sentence that was vacated. (See *Buycks*, *supra*, 5 Cal.5th at p. 893.) Application of this rule in Penal Code section 1170.18 resentencing authorized a trial court to “reevaluate the continued applicability of any enhancement based on a prior felony conviction.” (*Id.* at p. 894.)

The effect of reducing an enhancement’s underlying felony to a misdemeanor pursuant to the Act is summed up thusly: “based on established presumptions we apply to measures designed to ameliorate punishment, a successful Proposition 47 petitioner may subsequently challenge, under subdivision (k) of [Penal Code] section 1170.18, any felony-based enhancement that is based on that previously designated felony, now reduced to misdemeanor, so long as the judgment containing the enhancement was not final when Proposition 47 took effect. In addition, finality aside, a defendant who successfully petitions for resentencing on a current Proposition 47 eligible conviction may, at the time of resentencing, challenge a felony-based enhancement contained in the same judgment because the prior felony conviction on which it was based has since been reduced to a misdemeanor.” (*Buycks*, *supra*, 5 Cal.5th at p. 879.)

Defendant, with the Attorney General’s agreement, contend the on-bail enhancement is no longer valid under *Buycks* because the underlying felony, defendant’s

possession conviction, was reduced to a misdemeanor at a Penal Code 1170.18 proceeding. They are right. While defendant's conviction was final for the purposes of retroactivity 60 days after he was placed on mandatory supervision in 2012 (see Pen. Code, §§ 1237, subd. (a), 1237.5; *People v. Mendez* (1999) 19 Cal.4th 1084, 1094; Cal. Rules of Court, rules 8.304(a) & (b), 8.308(a)), and therefore well before the effective date of the Act, he was entitled to a full resentencing when the trial court granted his Penal Code section 1170.18 petition as to the possession conviction. Under *Buycks*, the “for all purposes” language of subdivision (k) applied to his on-bail enhancement at this proceeding, thereby invalidating the enhancement as the underlying felony had been reduced to a misdemeanor. (See *Buycks, supra*, 5 Cal.5th at pp. 890-891 [applies to on-bail enhancement]; *id.* at pp. 893-894 [full resentencing rule under Pen. Code, § 1170.18].) We therefore vacate the enhancement.

II

The Health and Safety Code Section 11379, Subdivision (a) Conviction

When defendant entered his plea in 2012, section 11379, subdivision (a) provided, “every person who transports . . . , sells, . . . any controlled substance . . . shall be punished . . . for a period of two, three, or four years.” The word “transports” in section 11379 had been interpreted to mean moving illegal drugs from one location to another location, rather than merely held at one location. (*People v. Rogers* (1971) 5 Cal.3d 129, 134-135; *People v. Ormiston* (2003) 105 Cal.App.4th 676, 682; *People v. LaCross* (2001) 91 Cal.App.4th 182, 185.) Effective January 1, 2014, the Legislature added an element to the offense by defining “transports” to mean “transport for sale.” (§ 11379, subd. (c), as amended by Stats. 2013, ch. 504, § 2.) A statute lessening punishment is presumed to apply to all cases *not yet reduced to final judgment on the statute's effective date* unless there is a savings clause or its equivalent providing for prospective application. (*In re Estrada, supra*, 63 Cal.2d at pp. 744-745, 747-748; emphasis added.)

The trial court imposed sentence on defendant's felony transportation conviction and suspended execution in 2012. Where sentence is imposed and its execution suspended, defendant may appeal from the sentence as a final judgment or from the order granting probation as an order made after judgment. (Pen. Code, § 1203.2, subd. (c); *People v. Howard* (1997) 16 Cal.4th 1081, 1087-1095; *People v. Chagolla* (1984) 151 Cal.App.3d 1045, 1049; Cal. Rules of Court, rule 4.435(b)(2).) Here, defendant did not appeal and the sentence became the final judgment. (*People v. Ramirez* (2008) 159 Cal.App.4th 1412, 1421 [sentence imposed but execution suspended is an appealable order, if not challenged on appeal, is final and binding when probation is revoked].) For this reason, the trial court lacked jurisdiction to modify or change the sentence it ordered into execution after revoking defendant's mandatory supervision and denying probation. (*People v. Colado* (1995) 32 Cal.App.4th 260, 262-263; *Chagolla*, at p. 1049.)

Contrary to defendant's claim, he was not resentenced on transportation and the on-bail enhancement. He was only resentenced on the possession offense after the court reduced the offense from a felony to a misdemeanor pursuant to Penal Code section 1170.18.

Defendant contends in his supplemental brief that, under *Buycks*, he is entitled to relief on the transportation offense because he is entitled to full resentencing after the on-bail enhancement is stricken. Not so.

In a case decided before *Buycks*, the California Supreme Court held that a defendant convicted of transportation of a controlled substance under section 11379 is not entitled to resentencing under Proposition 47 because, if Proposition 47 had been in effect at the time of the crime, transportation of the controlled substance would still have been a felony. This is true even though the Legislature redefined "transportation" as "transport[ation] for sale" after the defendant's conviction. (*People v. Martinez* (2018) 4 Cal.5th 647, 652-655.) Neither *Buycks* nor any subsequent decision of the California Supreme Court has called into question the holding in *Martinez*, which we are bound to

follow. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) While defendant was entitled to resentencing under *Buycks* on his on-bail enhancement because he had been resentenced following his successful Penal Code section 1170.18 petition, a conviction for transportation of a controlled substance cannot be attacked or re-examined under Penal Code section 1170.18. Furthermore, remand for resentencing is unnecessary here, as we are only striking a single enhancement based on a change in the law enacted after the guilty plea. (See *People v. Haskin* (1992) 4 Cal.App.4th 1434, 1441 [“When sentencing error does not require additional evidence, further fact finding, or further exercise of discretion, the appellate court may modify the judgment appropriately and affirm it as modified”]; see also *Harris v. Superior Court* (2016) 1 Cal.5th 984, 987 [resentencing under Proposition 47 does allow setting aside plea agreement made before the Act’s enactment].) Since remand is unnecessary, and because Penal Code section 1170.18 does not apply to his transportation conviction, defendant’s contention is without merit.

Because the court imposed sentence and suspended execution, defendant’s transportation conviction was final in 2012. The new definition of transportation does not apply to that conviction.

III

The Sentence for Misdemeanor Possession

Defendant also challenges the consecutive, eight-month term imposed for misdemeanor possession, arguing it is the same sentence imposed when the offense was a felony, a direct violation of the intent of Proposition 47 to reduce taxpayers spending on incarceration for misdemeanors. Defendant forfeited this contention.

“[C]omplaints about the manner in which the trial court exercises its sentencing discretion and articulates its supporting reasons cannot be raised for the first time on appeal.” (*People v. Scott* (1994) 9 Cal.4th 331, 356.) A meaningful opportunity to object

exists “if, during the course of the sentencing hearing itself and before objections are made, the parties are clearly apprised of the sentence the court intends to impose and the reasons that support any discretionary choices.” (*Ibid.*)

Here, the court indicated that it had discussed its sentencing choices in chambers with counsel and invited comment on the record. Defense counsel only requested that the court impose concurrent, rather than consecutive, time for the misdemeanor. Defendant’s belated challenge on appeal is forfeited.

In any event, Penal Code section 1170.18, subdivision (e) provides that in resentencing after reducing an offense to a misdemeanor, imposition of a term longer than the original sentence is prohibited. Here, the term was the same, not longer.

DISPOSITION

The judgment is modified to strike the on-bail enhancement. In all other respects, the judgment is affirmed. The trial court is directed to prepare an amended abstract of judgment reflecting the modified judgment and to forward a certified copy to the Department of Corrections and Rehabilitation.

HULL, Acting P. J.

We concur:

MAURO, J.

HOCH, J.